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Faith-Based Charter Schools: An Idea Whose Time Is Unlikely to Come*

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Simply stated, the efforts of their supporters notwithstanding,[1] it is unlikely that faith-based charter schools,[2] which are opening as the number of religiously affiliated nonpublic schools declines,[3] can survive judicial scrutiny. Moreover, even if religious charter schools, whether Catholic,[4] Christian,[5] Jewish,[6] or Muslim,[7] can withstand challenges in federal courts,[8] it is likely that they would be struck down in state courts due to significant state constitutional restrictions[9] forbidding aid to religious institutions. Further, overlapping statutory limits typically prevent religious entities from operating charter schools,[10] require that they be nonsectarian in nature,[11] and/or restrict them to operating in nonsectarian manners.[12]

As an initial matter, it is important to note that the charter school movement, which began in 1991 in Minnesota,[13] has spread to 40 states plus the District of Columbia and Puerto Rico.[14] Charter schools, which are public schools of choice, are typically operated as not-for-profit organizations, essentially functioning as independent districts consisting of single schools, by private groups including parents either independently or occasionally in conjunction with public institutions such as universities.

In return for being exempted from many state regulations, charter schools are accountable for the academic achievement of their students. While charters vary in duration, they typically range from 3 to 5 years in length.[15] When contracts expire, depending on state law, charters can be renewed or terminated. Charter schools, although free from many state rules with regard to staff and curricular issues, remain subject to federal and state antidiscrimination laws such as those dealing with students with disabilities and employment. In addition, charter schools typically cannot be operated by religious groups.[16]

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Of course, significant questions remain over the extent to which faculty and staff in faith-based charter schools may actually teach about the religious beliefs and practices of their sponsors.

In light of the legal and educational issues surrounding the status of religious charter schools, this article is divided into two parts. The first section reviews key litigation addressing the parameters of public aid to religiously affiliated nonpublic schools because these cases provide the necessary background should judicial challenges arise to faith-based charter schools.[17] This first part of the paper also briefly reviews Supreme Court cases that forbid prayer and/or religious activities in school, an essential part of daily activities in religiously affiliated nonpublic schools that cannot continue in faith-based charter schools. The second part reviews educational and policy considerations dealing with how publicly funded financial assistance might impact the religious missions and identities of religiously affiliated nonpublic schools that seek to become faith-based charter schools; this section also reviews the constitutionality of both state aid to religious charter schools and the acceptability, if any, of prayer and religious activities in these schools. The article rounds out with a brief conclusion.

Establishment Clause Litigation

Background

The extent to which jurisdictions can provide assistance to religious schools depends on judicial interpretation of the Establishment Clause of the First Amendment to the United States Constitution. Added to the Constitution in 1791 as part of the Bill of Rights, according to the 16 words of the religion clauses of the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." While the First Amendment only forbids Congress from making laws establishing religion, in 1940 the Supreme Court extended its reach to the states through the Fourteenth Amendment in *Cantwell v. Connecticut*.[18] Consequently, litigation over state aid continues to be filed in both federal and state courts.

Unfortunately, the Supreme Court created confusion over the appropriate judicial standard when addressing state aid to religiously affiliated nonpublic schools and their students. As discussed below, the Court evaluates the constitutionality of such aid under the tripartite *Lemon v. Kurtzman* (*Lemon*),[19] wherein it invalidated government aid in the form of salary supplements to teachers. The Court has since modified the *Lemon* test in *Agostini v. Felton*[20] in which it allowed the on-site delivery of educational services for poor students in religiously affiliated nonpublic schools. The *Lemon-Agostini* test continues to engender controversy and lack of clarity because, as discussed

below, it is an amalgam of two judicial standards, one dealing with prayer and religious activity in schools, the other on tax exemptions for religious institutions used for worship. Even so, in applying *Lemon-Agostini*, the Court fails to distinguish how it can be applied in such divergent situations as a kind of "one-size-fits-all" standard in disputes over religion and education.

The Supreme Court accepted its first case on the merits on an Establishment Clause case involving religion and public education in *Everson v. Board of Education* (*Everson*).[21] In *Everson* the Court upheld a law from New Jersey that allowed parents to be reimbursed for the cost of transporting their children to religiously affiliated nonpublic schools. Since *Everson*, two camps evolved in the judiciary on the question of aid: separationists and accommodationists. The former support the Jeffersonian metaphor calling for the erection of a "wall of separation" between church and state,[22] language that does not appear in the Constitution; this is the perspective most often associated with the Supreme Court. Conversely, accommodationists reason that the government is not prohibited from permitting some aid or accommodating the needs of children under the so-called "Child Benefit Test" or from accommodating the religious preferences of parents who send their children to public schools.

It is worth noting that the federal Constitution is more open to some forms of aid to religious schools than its state counterparts. This distinction began to emerge on December 7, 1875, when President Ulysses S. Grant, in his final State of the Union address to Congress, called for a constitutional amendment

> forbidding the teaching [of religion in public schools]...and prohibiting the granting of any school funds, or school taxes or any part thereof, either by legislative, municipal, or other authority, for the benefit or in aid, directly or indirectly, of any religious sect or denomination.[23]

Following Grant's speech, Senator James K. Blaine of Maine unsuccessfully introduced a constitutional amendment in 1875 that would have prevented aid from going to schools "under the control of any religious sect,"[24] code for Roman Catholic schools. Even though Blaine's efforts failed, most jurisdictions adopted Blaine-type constitutional provisions that place substantial limits on the amounts and types of aid that state governments can provide to religious institutions, especially schools.[25]

Nineteenth-century concerns over the relationship between religion and education aside, the Supreme Court did not, as indicated below, address its first cases in this area until *Everson* in 1947. Over the ensuing years, the Court's modern Establishment Clause perspective on the constitutionality of

aid to religiously affiliated nonpublic schools evolved through three phases, each of which is described below. Insofar as the cases discussed in these sections are likely to be applied in litigation challenging the constitutionality of religious charter schools, the remainder of this section highlights key Supreme Court cases relevant to the parameters of permissible public aid to religious schools.

The Child Benefit Test

Phase one. During the first phase, which began in 1947 with *Everson* and ended in 1968 with *Board of Education of Central School District No. 1 v. Allen*,[26] the Supreme Court enunciated the Child Benefit Test. This test emerged as a legal construct that allows aid on the ground that doing so helps students rather than their religiously affiliated nonpublic schools.

Everson upheld a statute from New Jersey that permitted the local board to reimburse parents for the costs associated with sending their children to religiously affiliated nonpublic schools.[27] Without actually using the words "Child Benefit Test," a divided Supreme Court reasoned that it was permissible to extend a general benefit such as transportation to all children (and their parents) without regard to their religious beliefs. However, in language portending future developments, in which it would take a hard line against most forms of aid, Justice Black's majority opinion introduced the Jeffersonian metaphor, declaring that "the First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We could not approve the slightest breach."[28]

After *Everson*, lower courts reached mixed results over the constitutionality of publicly funded transportation to students who attend religiously affiliated nonpublic schools. Some cases forbade transportation to these students in determining that doing so violated state constitutions.[29] Other courts reached the opposite result in essentially relying on Child Benefit type analysis.[30] In its only other case dealing with transportation and religious schools, *Wolman v. Walter* (*Wolman*),[31] the Supreme Court struck down a statute from Ohio that permitted public funds to be used to provide buses for field trips for children who attended religiously affiliated nonpublic schools. In treating field trips as curriculum-related activities, the Justices largely viewed them as impermissible instruction rather than as nonideological secular services such as transportation.

In 1968, in *Board of Education of Central School District No. 1 v. Allen* (*Allen*),[32] the Supreme Court upheld the constitutionality of a law from New York that required local school boards to loan textbooks for instruction in secular subjects to children in grades 7 to 12 who attended nonpublic schools.

While the statute did not specify that the books had to be the same as those used in the public schools, it did require local public school board officials to approve their use before they could be adopted. Basing its judgment primarily on the Child Benefit Test, the Court ruled that the statute was constitutional because its purpose was neither to aid religion nor nonpublic schools and that its primary effect was to improve the quality of education for all children.

Until the Supreme Court allowed the delivery of services to individual students as in *Zobrest v. Catalina Foothills School District,*[33] *Allen* was the outer limit of the Child Benefit Test for large groups of children prior to its opinion in *Agostini v. Felton*;[34] both of these cases are discussed below. Further, the Court sustained the constitutionality of similar textbook provisions from Pennsylvania in *Meek v. Pittenger* (*Meek*)[35] and Ohio in *Wolman*[36] but struck down loans of instructional materials such as library books, computers, television sets, tape recorders, and maps to nonpublic schools. In these cases the Court also allowed local school boards to provide diagnostic services for auxiliary aid programs such as special education for students in their religiously affiliated nonpublic schools but contended that the programs had to be delivered off-site in public schools or neutral locations.

Phase two. Following their success in *Everson* and *Allen*, proponents of the Child Benefit Test pushed the proverbial legal envelope by advancing statutes in Pennsylvania and Rhode Island, respectively, dealing with a different form of aid. Both statutes provided assistance to religiously affiliated nonpublic schools in the guise of salary supplements for teachers in nonpublic schools, an issue that would certainly emerge in disputes involving religious charter schools. In a case that has come to represent the standard test in Establishment Clause cases, whether aid or prayer and religious activities in schools,[37] *Lemon v. Kurtzman,* [38] the Court invalidated both laws, ushering in an era of strict adherence to the Jeffersonian wall of separation of church and state.

In creating the tripartite measure destined to become known as the *Lemon* test, the Supreme Court combined the two-part test it crafted in the companion cases of *Abington v. Schempp* and *Murray v. Curlett* [39] in striking down prayer and Bible reading in public schools with a third element, addressing excessive entanglement, from *Walz v. Tax Commission of New York City,*[40] which upheld New York State's practice of providing state property tax exemptions for church property that is used in worship services. The Court wrote that:

> Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned

> from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, the statute must not foster "an excessive government entanglement with religion."[41]

As to entanglement the Court specified that "we must examine the character and purposes of the institutions that are benefitted, the nature of the aid that the State provides, and the resulting relationship between the government and religious authority."[42]

In *Lemon* the Justices distinguished impermissible aid for teachers' salaries from acceptable secular, neutral services such as textbooks or transportation that it had upheld in *Everson* and *Allen*, fearing the necessary oversight to ensure that teachers avoid nonideological perspectives in their classes. Interestingly, as exemplified by the final case during the second phase in the history of the Child Benefit Test, *Aguilar v. Felton* (*Aguilar*),[43] most statutes passed *Lemon's* first two prongs, but ran afoul of the excessive entanglement test, highlighting the fact that programs must pass all three of the independent prongs or be doomed. In *Aguilar*, a judgment reminiscent of *Meek* and *Wolman*, the Court struck down on-site delivery of Title I services designed to provide remedial instruction for poor children who attended religious schools in New York City based solely on the fear of entanglement absent any allegations of inappropriate conduct.[44]

The years between *Lemon* and *Aguilar*, then, represented the nadir of the Child Benefit Test from the perspective of proponents of the Child Benefit Test, as the Supreme Court refused to move beyond the limits it created in *Everson* and *Allen*. However, change was in the offing in the K-12 context in light of the Court's ruling in *Zobrest v. Catalina Foothills School District*.

Phase three. In upholding the constitutionality of a program of general vocational assistance to a blind man who was studying to become a clergyman at a religious college in *Witters v. Washington Department of Services for the Blind*,[45] the Supreme Court signaled that change had arrived in its Establishment Clause jurisprudence. Seven years later, in *Zobrest v. Catalina Foothills School District* (*Zobrest*),[46] the Justices began the reinvigoration of the Child Benefit Test, allowing it to enter a phase that extends through the present day. In *Zobrest,* the Court permitted the on-site delivery of a sign-language interpreter under the Individuals with Disabilities Education Act (IDEA)[47] for a deaf student in Arizona who sought to attend a Catholic high school. The Court decided that insofar as the interpreter provided neutral aid to the student without offering financial benefits to his parent or school and

there was no governmental participation in the instruction since the interpreter was only a conduit to effectuate the child's communications, he was entitled to the aid.

A year after *Zobrest*, though, the Supreme Court affirmed the unconstitutionality of a law from New York that created a school district that was contiguous with the boundaries of the village inhabited by members of a religious community. The law was designed to accommodate the needs of parents of children with disabilities so that their young would not have to be transported outside of their community to received educational services under the IDEA. In *Board of Education of Kiryas Joel Village School District v. Grumet* (*Kiryas Joel*),[48] the Court struck the law down on the grounds that the school board could have offered appropriate special education programs at one of its public schools or at a neutral site near one of the village's religious schools due to risk of too close of an association between religion and the state.[49]

The most significant post-*Lemon* change in the Supreme Court's Establishment Clause jurisdiction occurred in 1997 in *Agostini v. Felton* (*Agostini*).[50] The Justices dissolved the injunction that they upheld in *Aguilar*, thereby permitting the on-site delivery of Title I services in religiously affiliated nonpublic schools in New York City. The Court held that the on-site delivery did not violate the standards that it used to consider whether state aid advanced religion since there was no governmental indoctrination, there were no distinctions between recipients based on religion, and there was no excessive entanglement between religion and government. Also repudiating *Meek* and *Wolman*, the Court explained that a federal program that provides supplemental, remedial instruction and counseling services to disadvantaged children on a neutral basis is not unconstitutional when the assistance is provided on-site in religiously affiliated nonpublic schools pursuant to a program containing safeguards such as those that the New York City Board of Education had created. The most significant jurisprudential development in *Agostini* was that the Court modified the *Lemon* test by reviewing only its first two parts, purpose and effect, while recasting entanglement as one element in evaluating the statute's effect.

Three years later, in *Mitchell v. Helms*,[51] a case from Louisiana, the Supreme Court expanded the limits of permissible aid to religiously affiliated nonpublic schools. A plurality, meaning that less than a five Justice majority agreed on the rationale, expressly repudiating those parts of *Meek* and *Wolman* to the contrary, upheld the constitutionality of a federal statute that permits the loans of instructional materials including library books, computers, television sets, tape recorders, and maps to nonpublic schools. In relying largely on the hybrid *Agostini* test, the Court pointed out that since the

statute's purpose was not in dispute, it only had to consider the law's effect. The Court thus found that the statute did not foster impermissible indoctrination because aid was allocated pursuant to neutral secular criteria that neither favored nor disfavored religion and was available to all schools based on secular, nondiscriminatory grounds.

The final Supreme Court case with direct relevance to the question of aid to religious charter schools is *Zelman v. Simmons–Harris* (*Zelman*).[52] In *Zelman*, the Court upheld a voucher program from Ohio that was part of a larger plan for helping poor students in Cleveland's failing public schools that had been taken over by the state as part of a desegregation remedy. Again relying on *Agostini*, the Court addressed "whether the government acted with the purpose of advancing or inhibiting religions [and] whether the aid has the 'effect' of advancing or inhibiting religion."[53]

Recognizing that the voucher program in *Zelman* had a valid secular purpose in providing aid for poor children, the Supreme Court examined whether it had the impermissible effect of advancing religion. The Justices observed that the voucher program was constitutional because, as part of the state's far-reaching attempt to provide greater educational opportunities for students in a failing school system, it allocated aid pursuant to neutral secular criteria that neither favored nor disfavored religion, was available to both religious and secular recipients on nondiscriminatory grounds, and offered assistance directly to a broad class of citizens who directed the aid to religious schools based entirely on their own genuine and independent private choices. In particular, the Court remarked that the law was constitutional insofar as it included safeguards so that tuition checks were sent to parents who them signed them over to schools such that there was no direct exchange of funds between religious schools and the state.

In *Zelman*, the Justices were unconcerned over that fact that most parents sent their children to religiously affiliated nonpublic schools because surrounding public school districts refused to participate in the program. As such, the Supreme Court acknowledged that since parents sent their children to the religiously affiliated nonpublic schools not as a matter of law but since they were unwelcomed in the public schools, the program passed constitutional muster. The Court concluded that since it was following an unbroken line of its own precedent supporting private choice that provided benefits directly to needy private individuals, the voucher program was constitutional.

Not surprisingly, post-*Zelman* suits challenging vouchers focused on state constitutional grounds since they are typically more stringent than under their federal counterpart.[54] In perhaps the most notable example, the Supreme Court of Florida invalidated a voucher program for students who

attended religious schools in interpreting the law authorizing it as violating the state constitution's requirement of a uniform system of free public schools.[55] Similarly, the Eleventh Circuit affirmed that under a voucher program in Florida that was available to students who attended failing schools, the state had no duty to pay for children to attend nonpublic schools.[56] Further, Maine's highest court upheld a statute that prohibited using either state[57] or municipal[58] money to pay tuition for children who attended religiously affiliated nonpublic schools.

Most recently, the Supreme Court refused to hear an appeal in a challenge to AmeriCorps, the nationwide community service program. The Circuit Court for the District of Columbia upheld the constitutionality of AmeriCorps, which had similarities to the Title I program in *Agostini*, even though some participants taught religion and secular subjects in religious schools since it was a government program that was neutral toward religion.[59] The Circuit Court was also satisfied that Americorps was constitutional because it offered aid directly to a broad class of citizens who, in turn, directed government aid to religious schools entirely on their own genuine and independent private choices. In its analysis, the court posited that no objective observer who was familiar with Americorps' history would have thought that the aid to religious institutions had governmental endorsement or approval.

School-Sponsored Prayer and Religious Activity

While the Supreme Court's perspective concerning aid to students and their religiously affiliated nonpublic schools has passed through three distinct stages, its attitude toward school-sponsored prayer and religious activity in public education has remained constant. Beginning with *Engel v. Vitale* (*Engel*)[60] the Justices have basically followed an unbroken line of cases prohibiting school-sponsored prayer and religious activity in public schools.

Engel, the Supreme Court's first case on point, involved a prayer composed by the New York State Board of Regents for suggested use in public schools to inculcate moral and spiritual values in students. The prayer read: "Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our country."[61] In response to a challenge to a local school board's having adopted the prayer as part of a policy requiring its daily recitation in class, the Court struck it down as a violation of the Establishment Clause. The Court ruled that even absent overt pressure, placing the power, privilege, and support of the government *qua* school board behind a particular religious belief ran the risk of impos-

ing indirect coercion on others, especially those who may have disagreed, to conform to the officially approved religion.

The following year, in the companion cases of *Abington v. Schempp* and *Murray v. Curlett* (*Abington*),[62] the Supreme Court struck down prayer, in the form of the recitation of the Lord's Prayer or Our Father, depending on one's Christian denomination, and reading of Bible verses without commentary in cases from Pennsylvania and Maryland, respectively. In invalidating the practices, the Court crafted the first two prongs of the *Lemon* test discussed earlier:

> The test may be stated as follows: what are the purpose and the primary effect of the [legislative] enactment?...[T]o withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[63]

Aware of the backlash that its judgment may have created, the Court hastened to add that its judgment did not prohibit the secular study of the Bible (or religion) in public schools in appropriate context such as literature or history.[64] Subsequently, the Court invalidated displays of the 10 Commandments in schools even though the material was paid for with private funds[65] as well as prayer at graduation[66] and high school football games.[67]

Discussion

Educational and Policy Considerations

Faith-based charter schools are seeking to step in to fill the void left by the closing of 1,200 religiously affiliated nonpublic schools between the years 2000 and 2006.[68] Leaders in religiously affiliated nonpublic school systems must grapple with increasing social secularism, population and demographic shifts, such as the growth of the percentages of students in Catholic schools, for example, who are not Catholic,[69] rising costs, and financial distress in light of the current economic conditions. These challenges present leaders in religiously affiliated nonpublic schools with the greatest challenge in their history as they attempt to offer affordable quality educational alternatives for families while staying faithful to their religious-educational missions. In fact, many historically culturally rich religious organizations face uphill battles against long odds in many places for survival, a situation that educational leaders in earlier generations neither experienced nor anticipated.

The existential crisis confronting leaders in religiously affiliated nonpublic schools has generated a situation of organizational ecology that can be

characterized as a Darwinist perspective requiring institutions to seek ongoing viability in an environment where "survival of the fittest" rules the day.[70] The advent of the charter school movement, while far from serving as a cure-all for the ailments that afflict religiously affiliated nonpublic schools, may have provided the worthwhile impetus compelling leaders in faith-based schools to confront their dire straits concerning the organizational mortality of their systems and the potential demise of individual schools.

Underpinning the charter school movement is that they provide educational choice, less bureaucracy, and a reduced amount of public financial contributions, apparently making for a perfect fit since such schools are seemingly modeled after the religious schools that they are largely replacing. In light of the organizational characteristics that charter schools generally share with religiously affiliated nonpublic schools, it may be easy to see why some faith-based educational leaders misguidedly viewed the exterior infrastructures of charter schools as providing quick fixes to their dilemmas in pursuit of the preservation of quality (religious) education. While many leaders in faith-based schools accept the notion of religious charter schools in good faith, they are deceived by a systemic isomorphic, or similar, organizational structure that mimics the success that religious schools have long enjoyed.[71]

More to the point, organizers of charter schools seek to flatten organizational structures in applying the principle of solidarity by bringing educational decision-making to the local level in the hope of improving student achievement because they share many of the same characteristics of religiously affiliated nonpublic schools. Among the qualities that charter and traditional religiously affiliated nonpublic schools have in common are that they tend to be mission driven, focus on academic achievement, operate as schools of choice, engage parents in the education of their children, provide a family-like learning atmosphere, build and anchor communities, promote a spirit of innovation, foster teacher professionalism, and offer new models of accountability.[72] Yet, what may be missing in charter schools are the intangible elements such as the faith dimensions or the beliefs of members of school communities that have helped faith-based schools succeed. Put another way, it is unclear how it is possible to have faith-based schools without allowing educators to teach explicitly about the faith and praxis that served as the engine that drove religiously affiliated nonpublic schools for generations.

In this mix, since most recognize the great good that religious schools have long provided,[73] not the least of which is saving public funds,[74] proponents of faith-based charter schools wish to establish schools as many religiously affiliated nonpublic schools cease operations. Of course, significant legal issues will arise when charter school organizers attempt to find ways

to circumvent constitutional and statutory provisions[75] expressly prohibiting them from implementing some of the very same characteristics that helped provide success in faith-based schools such as their religiosity and shared faith communities in attempting to open religious charter schools.

The initial openness of religious leaders, particularly in the Catholic school systems in Washington, D.C. and New York City,[76] to convert some of their schools into faith-based charter schools may well have been propelled by the superficial similarities between the two systems and the positive assistance that both can continue to offer in local communities, especially in inner cities. Along with these attributes, other external structures in the organization of public charter schools such as adaptability and flexibility find a great fit in the religious school culture while likewise adding to their isomorphic natures. In this regard, an argument may be made that charter schools are flexible enough to offer religious objectives in educational programming.[77]

On closer examination, though, it appears that the external organizational features of proposed faith-based charter schools only mimic the organizational domains of religiously affiliated nonpublic schools. Such a situation creates an ephemeral, even unreachable or unattainable, goal for those who wish to serve underrepresented populations in faith-based institutions since they would have to be transformed to what might be described as "religious schools-lite," schools constructed around religious themes broadly but which, based on the current state of the law, cannot include teachings of particular faiths as long as they receive public funds. Moreover, as legal controversies emerge, conflicts will arise in such key areas as governance and curricular content, incident to conflict over the notion of "control follows the dollar," topics that are discussed in the next section.

Legal Issues

As the number of religiously affiliated nonpublic schools declines, supporters of faith-based charter schools will undoubtedly step up their efforts to circumvent existing judicial precedent, statutes, and/or constitutional provisions restricting their ability to operate such schools. Yet, regardless of whether challengers apply the *Lemon* test or its hybrid *Agostini* version, the preceding review of litigation should demonstrate the likely insurmountable difficulty that supporters of faith-based charter schools will face in attempting to fend off Establishment Clause scrutiny.

The likelihood that laws creating religious charter schools will be struck down is very real because it is virtually impossible to argue that they can satisfy the requirements of having secular legislative purposes while avoiding

the advancing of religion, and/or sidestep concerns with excessive entanglement of religion and government, not only due to questions of aid but also on account of issues dealing with religious content in school curricula and other activities. Further, to the extent that faith-based charter schools would be seeking public funds, their religious practices would come under intense scrutiny insofar as the application of "control follows the dollar" would require closer oversight by governmental bodies, thereby exacerbating the constitutional difficulties, especially with regard to entanglement.

As individuals and/or groups seek to operate religious charter schools, they are likely to face a myriad of legal issues dealing with such significant issues as governance, parental choice, and the place of prayer and religious activity in schools and their curricula. As to the fundamental question of governance, to the extent that Catholic schools, for instance, are typically part of larger parish legal corporations, it is unclear how transfers of title would be viewed legally, especially if religious leaders were involved in establishing of governing boards. That is, since governance corresponds to the set of policies and customs by which organizations are controlled, thus ensuring representation by stakeholders, it is unclear what role the government would have in arrangements of this nature.

At the same time, when applied to faith-based charter schools, the notion of governance suggests that some other "body" is in control, such as an independent governing board, that may not share the beliefs of parents who wish to send their children to these schools. Consequently, while faith-based charter schools may offer opportunities for streamlined models of educational delivery and site-based control similar to what occurs in religiously affiliated nonpublic schools,[78] they must rely on outside bodies, or boards, of control. Even though religious institutions, acting as sponsors, may provide buildings and agencies for charter schools, they are unlikely to be exempt from the control issues related to not-for-profit boards, state statutes, and federal guidelines.

Faith-based charter schools are also likely to be confronted by a series of difficult questions with the potential to impact significantly their missions and identities, especially if they had formerly operated as religiously affiliated nonpublic schools. For example, how many parents of students in faith-based charter schools will not be parishioners or even members of their faith communities? Will school officials be required to report students who are undocumented aliens? If faculty members are to serve as role models, who will define what it means to do so, particularly in the context of Title VII and exceptions that allow religious employers to hire members of their own faiths?[79] Whose health curriculum, relating to such matters as birth control and abortion, will

have to be taught? Will administrators and teachers be viewed as ministers of the faith or agents of the state?

Additional questions are likely to emerge pursuant to the notion that parents opted to send their children to religious charter schools based on their own independent private choices. The notion of parental choice that the Supreme Court accepted in *Zelman* notwithstanding, challengers will raise questions over the extent to which such independent decision-making measures up with the requisite safeguards that need to be in place to avoid entanglement between religion and government, regardless of whether one applies the original *Lemon* or its modification in *Agostini*. Further, as reflected in *Kiryas Joel*, even when public officials try to accommodate sincerely held parental religious beliefs for the benefit of their children, Establishment Clause issues can come to the fore that would invalidate what may appear to be reasonable requests designed for the best educational interest of students.

Other significant challenges to religious charter schools will surface in connection with interrelated concerns dealing with prayer and religious activity, religious artifacts/iconography[80] in schools, and curricular content control. Serious concerns arise here under the purpose, effect, and entanglement prongs of *Lemon-Agostini*, especially in light of potential allegations that educators have advanced religion, a claim that has already surfaced in connection with the instructional program at a Muslim charter school in Minnesota,[81] a claim that its supporters dispute.[82]

Complying with case law will undoubtedly require educational leaders to prevent prayer and religious activity from taking place in faith-based charter schools, the posting of religious artifacts/iconography in schools,[83] and instruction about religion from curricula, changes that would fundamentally modify their nature and missions. In this light, it is mystifying why Catholic religious leaders in the District of Columbia and New York City[84] would have chosen to embark on such an approach.[85] While it may be admirable that these leaders tried to ensure the survival of the diversity that religious schools provide in the educational marketplace of ideas, at what cost are they doing so? Are they essentially "robbing Peter to pay Paul" in creating faith-based charter schools that could probably not teach about religion? In other words, to the extent that religiously affiliated nonpublic schools, especially at the elementary school level, are dedicated to the inculcation of the beliefs of their faiths, it remains to be seem how such schools can survive judicial challenges if they teach about religion.

As to the issue of religion in curricula, it is mystifying why religious leaders would seek to move to a faith-based charter school model since they will have lost substantial, if not total, control over school operations. A related

question is whether courts would treat transfers in ownership in title over buildings as sham transactions that are essentially designed to accomplish educational/curricular goals that they had hitherto been prohibited from pursuing. Further, even if one places the issue of ownership and control aside, insofar as charter schools are public schools, albeit ones that are free from many state requirements, and it is well settled that they can teach about religion but cannot teach religion per se,[86] disputes are likely to emerge over how pervasive religion is in school curricula.

The upshot is that to the extent that faith-based charter schools seek to teach about religion in a manner similar to what transpires in religiously affiliated nonpublic schools, then, consistent with precedent, they will be prohibited from doing so. Beyond that, even if faith-based charter schools are able to teach about religion, it opens the door to the specter of having civil educational officials decide what can and cannot be taught in religion classes, thereby running the risk of casting a new "pall of orthodoxy"[87] on the free exercise of religion in educational settings. This is a situation that even the most ardent proponents of faith-based charter schools would not welcome.

Conclusion

As noted at the outset, despite the well-intentioned efforts of their supporters, the combination of constitutional and statutory prohibitions, in conjunction with long-standing judicial precedent, make it clear that organizers of faith-based charter schools are unlikely to have much success. Thus, proponents of faith-based charter schools may have to go back to the proverbial drawing board in attempting to devise means of serving children whose parents would like them educated in religious environments.

Notes

1. *See*, *e.g.*, Lawrence D. Weinberg, *Religious Charter Schools: Legalities and Practicalities*. Charlotte, NC: Information Age Publishers (2007); Benjamin Siracusa Hillman, "Is There a Place for Religious Charter Schools?" *Yale Law Journal*, 554-599, (2008) at p. 118, maintaining "that there is a place for religious charter schools primarily in districts best able to ameliorate these concerns—those that have sufficient resources and the diversity of religious groups necessary to create a variety of religious and nonreligious school options;" this article pays particular attention to the Tarek ibn Ziyad Academy in Inver Grove Heights, Minnesota, described in note 7 *infra* and the Ben Gamla charter school in Hollywood, Florida in note 6 *infra*.

2. Since faith-based charter schools are also commonly referred to as religious charter schools, this article uses both terms interchangeably.

3. Erik W. Robelen, "Bush Voices Faith in Religious City Schools," *Education Week*, April 30, 2008, at p. 21 (noting that "between 2000 and 2006, 1,200 religious schools in American cities have shut down, displacing some 400,000 students").

4. Bill Turque, "D.C. Still in Search of Charter School Funds," *Washington Post*, June 30, 2008, at B 1; also at http://www.washingtonpost.com/wp-dyn/content/article/2008/06/29/AR2008062902002.html; Paul Vitello & Wendy Hu, "For Catholic Schools, Crisis and Catharsis," *N.Y. Times*, Jan. 18, 2009, at A29.

5. Tara Hettinger, "Rock Creek Christian Academy in Sellersburg Seeks Charter School Status: School to Hear Soon if Approved," *The Evening News and The Tribune* (Jeffersonville, IN), March 1, 2009 (pg. unavailable online), available at WLNR 3961582.

6. *See*, *e.g.*, Diane Ravitch, "New School Flunks Unity Test: Hebrew-Language Charter Should Not Have Been Approved," *New York Daily News*, Jan. 18, 2009, available at http://www.nydailynews.com/opinions/2009/01/18/2009-01-18_new_school_flunks_unity_test_hebrew langu.html. *See also* Hannah Sampson, "Hollywood: Will School Cross Lines on Religion? A New English-Hebrew Charter School has come Under Fire Before Its Scheduled August Opening in Hollywood," *Miami Herald,* July 13, 2007, at A1.

7. Randy Furst & Sarah LeMagie, "ACLU Suit Claims School Promotes Religion: Practices at Tarek ibn Ziyad Academy, a Tax-Supported Charter School in Inver Grove Heights and Blaine, Violate the Constitution by Supporting Islam," *Minneapolis-St. Paul Star Tribune*, Jan. 22, 2009 at 3B. *See also* "Lawsuit Says Minn. Charter School Illegally Promotes Muslim Religion," *Education Week*, Jan. 28, 2009, at p.4.

8. *See Zelman v. Simmons Harris*, 536 U.S. 639 (2002) (upholding the constitutionality of vouchers under the federal Establishment Clause).

9. *See*, *e.g.*, *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006) (affirming that a voucher system that aided students in religiously affiliated nonpublic schools violated the state constitution's requirement of a uniform system of free public schools).

10. *See*, *e.g.*, Ohio Rev. Code § 3314.03(11)(c): "The school will be nonsectarian in its programs, admission policies, employment practices, and all

other operations, and will not be operated by a sectarian school or religious institution;" Minn Stat. Ann. 124D10.8 (c): "A charter school must be nonsectarian in its programs, admission policies, employment practices, and all other operations. A sponsor may not authorize a charter school or program that is affiliated with a nonpublic sectarian school or a religious institution;" Okla. Stat. Ann. Tit. 3-136A.2: "A charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations. A sponsor may not authorize a charter school or program that is affiliated with a nonpublic sectarian school or religious institution."

11. *See*, *e.g.*, D.C. Code Ann. § 38-102.04(c): "(15) Nonsectarian nature of schools. —A public charter school shall be nonsectarian and shall not be affiliated with a sectarian school or religious institution;" N.C. Gen. Stat. § 115C-238.29F(b): "School Nonsectarian.—A charter school shall be nonsectarian in its programs, admission policies, employment practices, and all other operations and shall not charge tuition or fees. A charter school shall not be affiliated with a nonpublic sectarian school or a religious institution;" R.I. Gen. Laws § 16-77-3(d): "No private or parochial schools shall be eligible for charter school status, nor shall a charter school be affiliated in any way with a sectarian school or religious institution. Any charter school authorized by this chapter shall be nonsectarian and nonreligious in its programs, admissions policies, employment practices, and all other operations."

12. *See*, *e.g.*, Fla. Stat. Ann. § 1000.33(9)(a): "(a) A charter school shall be nonsectarian in its programs, admission policies, employment practices, and operations."

13. Minn. Stat. Ann. § 124D.10.

14. *See* http://www.uscharterschools.org (overview).

15. *Missouri v. Williamson*, 141 S.W.3d 418 (Mo. Ct. App. 2004), *reh'g denied* (2004) (noting that a charter was good for 5 years as a matter of law).

16. *See*, *e.g.*, Ohio Rev. Code § 3314.03(11)(c), *supra* note 10.

17. In the seminal case in this area, the Supreme Court upheld the right of religiously affiliated nonpublic schools to operate in *Pierce v. Society of Sisters of the Holy Names of Jesus and Mary*, 268 U.S. 510 (1925).

18. 310 U.S. 296 (1940) (invalidating the convictions of Jehovah's Witnesses for violating a statute against the solicitation of funds for religious or other reasons without approval of public officials).

19. 403 U.S. 602 (1971).

20. 521 U.S. 203 (1997).

21. 330 U.S. 1 (1947), *reh'g denied*, 330 U.S. 855 (1947).

22. The metaphor of the "wall of separation" comes from Thomas Jefferson's letter of January 1, 1802, to Nehemiah Dodge, Ephraim Robbins, and Stephen S. Nelson, A Committee of the Danbury Baptist Association. 16 Writings of Thomas Jefferson 281 (Andrew A. Lipsocomb, Ed.). Washington, DC: Thomas Jefferson Memorial Association (1903).

23. 4 Cong. Rec. 175 (1875).

24. *See* 4 Cong. Rec. 205 (1875) (Blaine's statement submitting a proposed constitutional amendment to Congress).

25. Thirty-six states, plus Puerto Rico, have Blaine-type language in their constitutions. *See*, *e.g.*, Alaska Constit. art. VII, § 1; Cal. Constit. art. XVI, § 5; Colo. Constit. art. IX, § 7; Fla. Constit. art. I, § 3; Haw. Constit. art. X, § 1; Mich. Constit. art. I, § 4; Mo. Constit. art. IX, § 8; Neb. Constit. art. VII, § 11; Okla. Constit. art. II, § 5; Pa. Constit. art. III, § 29; Tex. Constit. art. I, § 7; Va. Constit. art. IV, § 16; Wis. Constit. art. I, § 18. For a biting critique of the Blaine Amendment, *see Mitchell v. Helms*, 530 U.S. 793, 828-829 (2000) at 829 ("This doctrine, born in bigotry, should be buried now").

26. 392 U.S. 236 (1968).

27. Earlier, in *Cochran v. Louisiana State Bd. of Educ.,* 281 U.S. 370 (1930), the Supreme Court unanimously upheld a statute from Louisiana that allowed the loans of textbooks to all children, including those who attended religious schools. In language that would emerge in the Child Benefit Test in *Everson*, the Court affirmed that the students, rather than their schools, were the beneficiaries of the law. However, in an important distinction, the Court upheld the law on the basis of the Fourteenth Amendment's Due Process Clause rather than the First Amendment.

28. *Everson*, *supra* note 21, at 18.

29. *See, e.g., Visser v. Nooksack Valley Sch. Dist. No. 506*, 207 P.2d 198 (Wash. 1949); *McVey v. Hawkins*, 258 S.W.2d 927 (Mo.1953); *Matthews v. Quinton*, 362 P.2d 932 (Alaska 1961), *cert. denied*, 368 U.S. 517 (1962); *Board of Educ. for Indep. Sch. Dist. No. 52 v. Antone*, 384 P.2d 911 (Okla. 1963); *Epeldi v. Engelking*, 488 P.2d 860 (Idaho 1971), *cert. denied*, 406 U.S. 957 (1972); *Americans United for Separation of Church and State v. Benton*, 413 F. Supp. 955 (S.D. Iowa 1975).

30. *Cromwell Property Owners Ass'n. v. Toffolon*, 495 F. Supp. 915 (D. Conn. 1979); *Pequea Valley Sch. Dist. v. Commonwealth of Pa. Dep't of Educ.*, 397 A.2d 1154 (Pa. 1979); *Members of Jamestown Sch. Comm. v. Schmidt*, 699 F.2d 1 (1st Cir.1983), *cert. denied*, 464 U.S. 851 (1983); *Neal v. Fiscal Court, Jefferson County*, 986 S.W.2d 907 (Ky. 1999).

31. 433 U.S. 229 (1977).

32. 392 U.S. 236 (1968).

33. 509 U.S. 1 (1993).

34. 521 U.S. 203 (1997).

35. 421 U.S. 349 (1975).

36. 433 U.S. 229 (1977).

37. For commentary on cases in this area, *see* Charles J. Russo, "Prayer and Public School Activities: An Enduring Controversy," *Religion & Education,* 27(1)*,* 46-52 (2000).

38. 403 U.S. 602 (1971).

39. 374 U.S. 203 (1963).

40. 397 U.S. 664 (1970).

41. *Lemon*, *supra* note 38 at 612-613.

42. *Ibid.* at 615.

43. 473 U.S. 402 (1985).

44. On the same day that it resolved *Aguilar*, the Court affirmed the unconstitutionality of a released time program that allowed teachers who were paid with public funds to teach classes in religious schools in *School Dist. of City of Grand Rapids v. Ball*, 473 U.S. 373 (1985) on the basis that the program failed all three parts of the *Lemon* test.

45. 474 U.S. 481 (1986). However, illustrative of the fact that state courts are often more restrictive on aid, the Supreme Court of Washington interpreted its state constitution as forbidding such use of public funds and the Supreme Court refused to hear an appeal in *Witters v. State Comm'n for the Blind*, 771 P.2d 1119 (Wash.1989), *cert. denied*, 493 U.S. 850 (1989).

46. 509 U.S. 1 (1993).

47. 20 U.S.C.A. §§ 1400 *et seq.*

48. 512 U.S. 687 (1994).

49. State courts subsequently struck down an amended statute and the Supreme Court refused to hear an appeal in *Grumet v. Cuomo*, 659 N.Y.S.2d 173 (N.Y. 1997), *aff'd sub nom. Grumet v. Pataki*, 697 N.Y.S.2d 846 (N.Y. 1999), *cert. denied*, 528 U.S. 946 (1999).

50. 521 U.S. 203 (1997).

51. 530 U.S. 793 (2000), *reh'g denied*, 530 U.S. 1296 (2000), *on remand sub nom*. *Helms v. Picard*, 229 F.3d 467 (5th Cir. 2000).

52. 536 U.S. 639 (2002).

53. *Ibid.* at 649.

54. Reflective of this point, prior to *Zelman*, courts reached mixed results on vouchers. The Supreme Court of Wisconsin in *Jackson v. Benson*, 578 N.W.2d 602 (Wis.1998), *cert. denied*, 525 U.S. 997 (1998), along with state *Bagley v. Raymond Sch. Dep't*, 728 A.2d 127 (Me. 1999), *cert. denied*, 528 U.S. 947 (1999) and federal *Strout v. Albanese*, 178 F.3d 57 (1st Cir. 1999), *cert. denied*, 528 U.S. 931 (1999), appellate courts in Maine upheld laws including nonsectarian schools but excluding religiously affiliated nonpublic schools from tuition vouchers programs. Also, the Supreme Court of Vermont affirmed the unconstitutionality of a state law that would have permitted taxpayer support to reimburse parents for tuition for religiously affiliated nonpublic schools in *Chittenden Town Sch. Dist. v. Department of Educ.*, 738 A.2d 539 (Vt. 1999).

55. *Bush v. Holmes*, 919 So. 2d 392 (Fla. 2006).

56. *Children A & B ex rel. Cooper v. Florida*, 355 F. Supp.2d 1298 (N.D. Fla. 2004), *aff'd sub nom Cooper v. Florida*, 140 Fed.Appx. 845 (11th Cir. 2005).

57. *Anderson v. Town of Durham*, 895 A.2d 944 (Me. 2006), *cert. denied*, 549 U.S. 1051 (2006).

58. *Joyce v. State of Maine*, 951 A.2d 69 (Me. 2008).

59. *American Jewish Congress v. Corporation for Nat'l and Community Serv.*, 399 F.3d 351 (D.C. Cir. 2005), *cert. denied*, 546 U.S. 1130 (2006).

60. 370 U.S. 421 (1962).

61. *Ibid.* at 422.

62. *Supra* note 39.

63. *Ibid.* at 222.

64. According to the Court: "It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment," *Id.* at 225. Justice Brennan's concurrence added that "The holding of the Court today plainly does not foreclose teaching about the Holy Scriptures or about the differences between religious sects in classes in literature or history," *Id*. at 300.

65. *Stone v. Graham*, 449 U.S. 39 (1980), *reh'g denied*, 449 U.S. 1104 (1981), *on remand*, 612 S.W.2d 133 (Ky. 1981).

66. *Lee v. Weisman*, 505 U.S. 577 (1992).

67. *Santa Fe Independent Sch. Dist. v. Doe*, 530 U.S. 290 (2000).

68. *See supra* note 3.

69. *See* Dale McDonald & Margaret M. Schultz, *United States Catholic Elementary and Secondary Schools 2007-2008: The Annual Statistical Report on Schools, Enrollment and Staffing.*Washington: DC: National Catholic Educational Association (2008) at p. 22, Exhibit 27, reporting that the percentage of non-Catholic students in Catholic schools rose from 2.7% in 1970 to 14.1% in 2007-2008.

70. Michael T. Hannan & John Freeman, "The Population Ecology of Organization," *American Journal of Sociology*, *82*(5), 929-964 (1977).

71. A wide array of social scientists have recognized the success of religious schools, especially in urban environments. *See*, *e.g.*, Andrew M. Greeley & Peter B. Rossi*, The Education of Catholic Americans.* Chicago: Aldine Publishing Company (1966); Anthony S. Bryk, Peter B. Holland, Valerie E. Lee, & Ruben A. Carriedo, *Effective Catholic Schools: An Exploration*. Washington, DC: National Catholic Educational Association (1984); James S. Coleman, Thomas Hoffer, & Sally Kilgore, *High School Achievement: Public, Catholic & Private Schools Compared*. New York: Basic Books (1982). James C. Coleman & Thomas Hoffer, *Public and Private High Schools: The Impact of Communities.* New York: Basic Books (1987). Jacqueline Jordan Irvine & Michele Foster (Eds.), *Growing up African American in Catholic Schools*. New York: Teachers College Press (1996).

72. These characteristics were identified, described, and discussed in Chester E. Finn, Bruno V. Manno, & Gregg Vanourek, *Charter Schools in Action: Renewing Public Education.* Princeton, NJ: Princeton University Press (2001).

73. *See*, *e.g.*, *Allen*, *supra* note 26 at 247-248 (1968) (upholding loans of secular textbook to students in nonpublic schools): "Underlying these cases, and underlying also the legislative judgments that have preceded the court decisions, has been a recognition that private education has played and is playing a significant and valuable role in raising national levels of knowledge, competence, and experience. Americans care about the quality of the secular education available to their children. They have considered high quality education to be an indispensable ingredient for achieving the kind of nation, and the kind of citizenry, that they have desired to create. Considering this attitude, the continued willingness to rely on private school systems, including parochial systems, strongly suggests that a wide segment of informed opinion, legislative and otherwise, has found that those schools do an acceptable job of providing secular education to their students. This judgment is further evidence that parochial schools are performing, in addition to their sectarian function, the task of secular education."

74. As reflected by its title, a recent news story documented the amount of money that Roman Catholic Schools save the public, "Catholic Schools Contribute $19.8 Billion Annually to Nation," Dec, 11, 2008, available at http://www.reuters.com/article/pressRelease/idUS233266+11-Dec-2008+PRN20081211

75. *See supra* notes 10-13.

76. *See supra* note 4.

77. *See*, *e.g.*, the arguments made by the authors in note 1.

78. Gerald M. Cattaro, "Constructivism and Collaboration: A Case for Nonpublic Schools." In Regis Bernhardt, Carolyn Hedley, Gerald M. Cattaro, & Vasilious Svolopoulos (Eds.), *Curriculum Leadership: Rethinking Schools for the 21st Century*, 69-87, Cresskill, NJ: Hampton Press (1998).

79. The first, and arguably most important exemption under Title VII deals with instances where "religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the operations of that particular business or enterprise." 42 U.S.C.A. § 2000e-2(e)(1).

80. *See Skoros v. City of N.Y.*, 437 F.3d 1 (2d Cir. 2006), *cert. denied*, 127 S. Ct. 1245 (2007) (invalidating displays of Christmas manger scenes in public schools but allowing menorahs along with stars and crescents to remain in place). For commentary on this case, *see* Charles J. Russo "Of Baby Jesus and the Easter Bunny: Does Christianity Still Have a Place in

the Educational Marketplace of Ideas in the United States?" *Education and Law Journal, 16*(1)*,* 61-81 (2006).

81. *See supra* note 3.

82. Elliot Mann, "Religion Not in Curriculum at Charter School," *Post-Bulletin* (Rochester, MN). Jan. 23, 2009 (pg. unavailable online), available at WLNR 1507405.

83. *See*, *e.g.*, *Stone v. Graham*, *supra* note 65; *Agostini v. Felton*, supra note 20 (although upholding the on-site delivery of Title I services in religiously affiliated nonpublic schools, noting that New York City Board of Education rules required that all religious artifacts be removed in rooms where services were provided).

84. *See supra* note 4.

85. For a brief discussion of this point, *see* Charles C. Haynes, "Can Religious Charters Keep the Faith?" *Long Beach Press Tele.* (CA), June 24, 2008, at 13 A, available at WLNR 11864330.

86. See *supra* note 39 and accompanying text on *Abington*.

87. *Keyishian v. Board of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967) (striking down a loyalty oath for faculty in higher education).